

### **III. The Presumptive Standard Should Employ Product and Geographic Market Definitions Designed to Ensure an Ample Number of Competing Media "Voices"**

The relaxation that we urge would call for an initial evaluation of whether a given cross-ownership meets the "30 Voices" or "Top 50/ 30 Voices" test. Following the model of the radio/TV rule, the Commission should define both the range of media that will count as "voices" and the area in which a given medium will be treated as a "voice" by reference to its central objective -- to ensure that any given cross-ownership leaves the public with an ample number of media "voices" from which to choose.

Application of the test we propose in point II would presumptively resolve competitive as well as other issues. But that consequence flows (as it does in the analogous situation under the radio/TV rule) from an overall judgment concerning the likely competitive effects of radio/newspaper cross-ownership in larger markets. In the absence of special circumstances, there would no need for the Commission to assay competitive effects in any one of the larger markets more closely. And it need not incorporate into its presumptive standard product and geographic market definitions specifically devised with a view to competitive analysis.

#### **A. The Relevant Product Market for Purposes of the Presumptive Test**

As point I makes clear, many different media are relevant in assessing the effects of any given newspaper/radio cross-ownership. In applying its "Top 25/30 Voices" standard under the radio/TV rule, however, the Commission counts only radio and TV ownerships. Although the Commission recognized the pertinence of other media when it adopted this policy, it confined the media to be counted to radio and TV stations "in the interests of caution and because the

radio-TV cross-ownership rule deals only with traditional broadcast outlets." Radio/TV Ownership, 4 FCC Rcd at 1752.

Here, the rule focuses on a broader array of media, and caution is no longer warranted. As we have shown, moreover, the Commission considers the broader range of media when it considers waivers of the radio/TV rule case-by-case. There is no warrant, we suggest, for this disparity in approach. All media that are geographically relevant in a given case should be counted.

They should also count equally. The rule's central policy is to promote "the widest possible dissemination of information from diverse and antagonistic sources"<sup>53/</sup> -- to maximize the number of competing sources among which the public may select. A standard employed to implement that policy should not discriminate among potentially available sources of information or viewpoints on the basis of their popularity or influence. As the Commission recognized in 1984, moreover, ideas are ambulatory -- they migrate from region to region (and from one medium in an area to another).<sup>54/</sup> The essential question, therefore, is whether a given source of relevant information is *available* to the public in any given area or community, not whether it is popular or influential. The relative popularity or influence of any source is a matter for choice by the public.<sup>55/</sup>

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<sup>53/</sup> Associated Press v. United States, 326 U.S. 1, 20 (1945).

<sup>54/</sup> See National Ownership, 100 FCC 2d at 37.

<sup>55/</sup> Disparities between the technical facilities of different stations or the circulation figures for different newspapers should likewise be irrelevant so long as the entities in question all serve the relevant geographic market. Cf., Notice, ¶ 11. The 1975 Commission's remarks about the lesser significance of radio stations for diversity purposes (i) were addressed to the limited question of whether the availability of a local radio station should suffice to exempt what would otherwise be a "one newspaper/one TV station" monopoly from the divestiture

Similarly, the fact that some radio stations (or television stations) provide little local information and opinion does not matter. As the Commission noted when it adopted the 1970 version of the radio/TV rule, the cross-ownership rules focus on the power of a particular owner to control a media outlet's editorial choices, not the use made of that power.<sup>56/</sup> In addition, as Bruce Owen has pointed out, broadcast station formats are changeable. If a substantial number of viewers or listeners are dissatisfied with the amount of viewpoint-laden service available to them, there will be significant market incentives for stations that provide little such service to switch formats and serve the unsatisfied need.<sup>57/</sup>

Thus, the Commission should count equally all daily and weekly newspapers, television stations, radio stations, and cable channels that have the capacity to act as local outlets for the area served in common by a proposed newspaper/radio combination. Moreover, here (as in the

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requirement generally imposed in such cases, 1975 Rule, 50 FCC 2d at 1083, and (ii) must be considered in light of the 1984 Commission's repudiation of policies that discriminate among media on the basis of their presumed influence. See note 20, supra.

<sup>56/</sup> See First Report and Order, Docket No. 18110, 22 FCC 2d 306, 310 ("The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use") & 311 ("As pointed out above, the governing consideration here is power, and power can be realistically tempered on a structural basis") (1970), recon., 28 FCC 2d 662 (1971). In 1975, the Commission inferred from the owner's power to control the editorial choices of owned media that the viewpoint and approach of competing media can realistically be expected to be more divergent if they are "antagonistically run" than if they are commonly owned. 1975 Rule, 50 FCC 2d at 1079-80. The newspaper/broadcast rule was upheld on the basis of that inference. FCC v. NCCB, 436 U.S. at 797.

<sup>57/</sup> See Owen, MM Docket No. 91-221 at 55-56. Such a format change is entirely plausible. Between 1989 and 1996, commercial radio stations employing "news, talk" as their primary format increased from 308 to 1272, an increase of 319%, while the total number of commercial stations increased only from 9254 to 10261. See M Street Journal, Oct. 23, 1996, at 10.

case of the radio/TV rule), noncommercial stations and cable channels should be counted, as well as commercial stations and channels.<sup>58/</sup>

### **B. The Relevant Geographic Market for Purposes of the Presumptive Test**

Under current policy, "the geographic area to be considered in evaluating a radio/newspaper cross-ownership waiver is the area of overlap between the defining signal contour of the radio station (1 mV/m for FM and 2 mV/m for AM) and the area of significant circulation of the newspaper." Notice, ¶ 14. The radio/TV cross-ownership rule, in contrast, considers "television licensees in the relevant ADI [or DMA] and radio licensees in the relevant television metropolitan market."<sup>59/</sup> The Notice questions (at ¶ 15) whether the DMA/Metro standard is appropriate for present purposes. It also asks (at ¶ 14) whether "the Commission should take into account the possibility that even major outlets serving a metropolitan market may underserve suburban communities in the metro region."

We suggest that a proper approach must take into account the relevant characteristics of both newspapers and radio stations. Students of newspaper competition in this country have classified newspapers in four "layers" -- metropolitan dailies, satellite-city dailies, suburban dailies and weeklies:

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<sup>58/</sup> See Radio/TV Ownership, 4 FCC Rcd at 1751. The Commission agreed in Radio Duopoly that noncommercial stations "represent an additional voice in terms of traditional diversity concerns." It excluded such stations from consideration in that proceeding because they "do not compete for commercial advertising and are generally not included in reported ratings surveys." Radio Duopoly, 7 FCC Rcd at 6395.

<sup>59/</sup> See 47 C.F.R. § 73.3555 Note 7 (1).

Metropolitan dailies cover a wide geographic area and provide extensive national and international news, as well as local news about the metropolitan area. Satellite-city dailies are published outside of metropolitan areas, but their markets are close enough to have notable circulation from metropolitan dailies. These dailies also provide national and international coverage, but they are more local in nature than are metropolitan dailies. Suburban dailies are those dailies found within the metropolitan area but outside the central city. They are primarily local in nature. The weekly layer is almost entirely local.<sup>60/</sup>

Radio stations are less easy to categorize. However, the presumption of the radio/TV rule is that radio stations licensed to communities in a metro area act as local outlets for the central city (or cities) and the area as a whole (with special emphasis, as required by the Commission, upon their communities of license). That presumption is surely sound. Arbitron's radio metro areas define the principal arena within which the metro radio commercial stations compete as outlets for advertisers.<sup>61/</sup> Arbitron's metro areas, moreover, "generally correspond to the federal government's Office of Management and Budget's (OMB) Metropolitan Areas,"<sup>62/</sup> which in turn reflect the "general concept" of "a core area containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with that core."<sup>63/</sup> Both the commercial and the noncommercial radio stations in such a metro area have reason to address the needs and issues of its major cities and the area as a whole (once again, with special emphasis on their cities of license).

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<sup>60/</sup> Lacy and Davenport, Daily Newspaper Market Structure, Concentration, and Competition, 7 J. of Media Econ. 33, 34 (1994).

<sup>61/</sup> Such differences as may exist between the television metro areas defined by Nielsen and the radio metro areas defined by Arbitron are not, we suggest, generally significant.

<sup>62/</sup> Appendix B attached hereto, Arbitron, Radio Market Report - Detroit at M3.

<sup>63/</sup> Statistical Abstract of the United States, 1996 at 937 Appendix II.

Where radio/TV cross-ownership is proposed for stations located outside of any metro area, the Commission has recognized that a different approach is appropriate. Thus, "when the relevant Area of Dominant Influence (the previous television market measurement device employed by the Commission prior to the use of DMAs) was very large but the stations involved in a transaction competed only in a relatively small local community," the Commission has treated broadcast stations licensed to that community or to others nearby as the relevant local "voices."<sup>64/</sup>

These differences in types of newspapers and radio stations should govern the geographic market that is utilized in assessing the effects of any given newspaper/radio cross-ownership on the number of "voices" available to the public. Consider, for example, cross-ownership between a Detroit radio station and the Detroit News and Free Press -- jointly operated papers with a Retail Trading Zone that coincides with the Detroit PMSA.<sup>65/</sup> The area of overlap between the Retail Trading Zone and the Detroit radio metro area defines the area for which both media are sources of information and opinion on local issues.<sup>66/</sup> But as the Commission's Notice suggests

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<sup>64/</sup> Spectrum Radio, Inc., FCC 97-13 ¶ 14, released Feb. 4, 1977, citing Burt H. Oliphant, 10 FCC Rcd 2708, 2711 (1994); Duane J. Polich, 4 FCC Rcd 5596, 5597 (1989).

<sup>65/</sup> See SRDS, Circulation 97, at 61 & 465. Daily newspapers report their circulation to the Audit Bureau of Circulation in various areas, including the City Zone (the corporate limits of the city of publication and immediately contiguous areas) and one or more of the following broader areas: the Retail Trading Zone (the area from which the City Zone retail merchants regularly receive trade), the Census Bureau MSA or PMSA, or the Newspaper Designated Market (a census defined area in which the newspaper is marketed). Source: Audit Bureau of Circulation. The broader area in which each newspaper chooses to report its circulation may be taken, we suggest, as roughly defining that paper's principal area of circulation.

<sup>66/</sup> In this instance (as in many others), these areas do not perfectly coincide. The Detroit radio metro area includes two counties -- Lapeer and St. Clair -- that are not in the Retail Trading Zone. See the maps in Appendix B, attached hereto.

(at ¶18), definition of such an area does not entirely resolve the question of how to count the media "voices" available to its residents. We have argued above that the criteria of the radio/TV rule -- radio stations in the metro area and TV stations in the DMA -- are appropriate in the case of broadcast media. Other media that can realistically be expected to perform the "local outlet" function for the area of concern should also count as sources of information and opinion. Thus, the effects of cross-ownership between the Detroit News and Free Press and a Detroit radio station can be assessed (for purposes of the presumptive test) by counting the number of independently owned radio stations in the radio metro area and television stations in the DMA, along with cable channels and weekly papers that are available in the area of concern.<sup>67/</sup> If there are enough such "voices," the cross-ownership should be allowed.

In hyphenated metro areas (e.g., Dallas-Fort Worth), newspapers published in each of the central cities may concentrate their marketing efforts on their own cities and nearby

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<sup>67/</sup> Local news channels on cable systems are often carried regionally. Washington, D.C.'s "News Channel 8" is carried by cable systems serving suburban Fairfax County, Arlington, Montgomery County and Prince Georges County. Television & Cable Factbook, 1996 Edition, at D-759, 761, 1792 & 1802. Similarly, alternative newsweeklies are often widely available in a metro area. See Borden, "Uneasy Reader: A Quest for Youth," Crains Chicago Business, Sept. 30, 1996, 1996 WL 12790893 (noting the distribution of alternative newsweekly NewCity "in Chicago and 45 suburbs"); Kyle, "Profitable Alternative," Crains Detroit Business, Sept. 5, 1988, 1988 WL 2450488 ("The greatest concentration -- and growth -- of drop-off points [for Detroit's Metro Times] is in Oakland County"). The Commission should also, we submit, take account of PEG channels and weekly newspapers whose service or circulation areas are more confined. If a substantial majority of the households in a metro area have access to at least one weekly paper (albeit not the same paper), the area as a whole should be credited on that account with one additional "voice." And if a substantial majority have access to two or more PEG channels -- each under independent editorial control -- the area as a whole should be credited with two additional "voices."

counties.<sup>68/</sup> The Commission recognized in 1975, however, that the broadcast media licensed to any of the central cities in a hyphenated market are perceived by the residents of all such cities as local, "and they so function in terms of responding to local problems."<sup>69/</sup> Thus, while the Fort Worth Star Telegram's principal area of circulation does not include Dallas,<sup>70/</sup> Dallas broadcast stations (along with others in the radio metro area) can realistically be regarded as local outlets for Fort Worth. And the same would apply to other significant metro-area media. Accordingly, television stations in the DMA and radio stations in the metro area (along with other metro-area media) should be counted. Cross-ownership between ABC's Fort Worth Star-Telegram and its Fort Worth radio stations (WBAP(AM) and KSCS-FM) should be allowed if there are enough remaining independently owned metro-area media voices.

Much the same analysis applies to cross-ownership between a central-city radio station (such as ABC's WJR(AM) and WHYT(FM), Detroit) and a suburban daily (such as ABC's

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<sup>68/</sup> The City Zone and Retail Trading Zone of the Fort Worth Star-Telegram and the Newspaper Designated Market of the Dallas Morning News overlap in Tarrant County (where Fort Worth is located) and several other counties. Each paper, however, serves counties on which the other does not concentrate. See Appendix B, attached hereto.

<sup>69/</sup> 50 FCC 2d at 1081. It was for this reason that the Commission used the encompassment of a newspaper community by a station's "principal community" contour (rather than its city of license) to define the circumstances in which an independently owned station was sufficiently local to warrant exempting what would otherwise be a "one paper/one station" monopoly from the divestiture requirement generally imposed. Id. at 1081-82. While the example of a hyphenated market that the Commission discussed involved television stations, the Commission clearly recognized the same point in regard to radio stations, for it employed the "principal city" contour criterion in that context as well. See id. at 1084, text at n.39; 53 FCC 2d at 590.

<sup>70/</sup> On the other hand, the Newspaper Designated Market for the Dallas Morning News does include Fort Worth, and the Dallas-Fort Worth Arbitron radio metro area includes the City Zones for both of the two major local dailies but omits some counties in the principal circulation area for each newspaper. See Appendix B, attached hereto.



Oakland Press). The Oakland Press is published in a city (Pontiac) and a county (Oakland) located within the Detroit radio metro area. Its Newspaper Designated Market does not even cover the whole of Oakland County.<sup>71/</sup> In such a case, while the area of concern may be limited to the suburb, central-city and metro-area media play a role that cannot be ignored. The residents of metro-area suburbs often care as much about issues and events of areawide significance as they do about issues confined to their own cities. The Detroit daily newspapers have a *higher* penetration of homes in Oakland County than the Oakland Press.<sup>72/</sup> Similarly, radio listening in Oakland County generally and in the portion of the county where the marketing efforts of the Oakland Press are concentrated is dominated by Detroit stations.<sup>73/</sup>

In addition, the massive shift of metropolitan population to the suburbs (and the tendency of suburbs to be more affluent than central cities) has forced metropolitan dailies to pay attention to suburban needs and concerns, both in their daily columns and in editions published one or more times a week that are "zoned" for particular suburban areas.<sup>74/</sup> Both the Detroit News and

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<sup>71/</sup> See Appendix B, attached hereto.

<sup>72/</sup> The Detroit papers' total daily penetration of the county (43.7%) is more than twice that of the Oakland Press (18.6%); substantially the same is true on Sundays, when the ratio is 54.6% to 21.8%. See SRDS, Circulation 97, at 455. Within the local paper's Newspaper Designated market, the daily penetration ratio is 35.61% to 21.77% in favor of the Oakland Press, and a similar situation is true on Sundays, when the ratio is 41.47% to 28.34% in favor of the Oakland Press. Source: Audit Bureau of Circulation.

<sup>73/</sup> Nine of the ten radio stations with the highest average reach in Oakland County as a whole or in the Oakland Press Newspaper Designated Market are licensed to Detroit. The tenth is licensed to Dearborn in Wayne County. Scarborough Report, Detroit Jan 96 - Aug 96, Media Ranking Reports for Oakland County and for Oakland Press NDM.

<sup>74/</sup> The phenomenon is not new. See, e.g., Nicks, "The Business of Newspapers," The Sunday Oklahoman, Sunday Magazine, Nov. 14, 1982, 1982 WL 2382116 (noting the institution of zoned editions in 1955); Raphael, "Upscale, Downscale: Suburban Debuts Papers," Crain's Detroit Business, Aug. 4, 1986, 1986 WL 2323141 (noting that the Detroit News began

the Detroit Free Press publish and distribute in Oakland County daily editions with specific pages set aside for Oakland County news.<sup>75/</sup> The same incentive to serve the needs of suburban communities affects central-city and other broadcast stations in the metro area,<sup>76/</sup> and those stations respond.<sup>77/</sup>

It is thus *not* the case that "smaller newspapers and broadcast outlets concentrating on the suburbs [are] the only outlets of any consequence for the suburban resident" (Notice, ¶ 14). Indeed, precisely because they are less dependent on any particular suburb, metropolitan media can supply the residents of a suburb with a less parochial perspective on that community's concerns and issues.<sup>78/</sup> Moreover, if the Commission should decide (notwithstanding these

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zoned editions in 1960 and that the Free Press "created its first zone, in Oakland County, in 1982").

<sup>75/</sup> A similar situation prevails in Arlington, Texas -- a suburb of Fort Worth where the Fort Worth Star Telegram has long published the daily Arlington Star Telegram and the Dallas Morning News has recently started to publish a daily Arlington Morning News. See Giobbe, "Lone Star Launch," Editor & Publisher, March 23, 1996, 1996 WL 9086240; Morton, "Invading Another Paper's Turf," American Journalism Review, June, 1996 at 48, 1996 WL 12876004; Yarborough, "Showdown for Customers; Texas-style newspaper competition in Arlington, Texas," Sales & Marketing Management, September, 1996 at 21, 1996 WL 8860546.

<sup>76/</sup> For the period from fall 1995 through summer 1996, on average some 53% of the cumulative metro-area listeners to any Detroit metro-area radio station were located in metro counties other than Wayne (in which Detroit is located). Source: Arbitron, Detroit Ranker, Persons 12+ In a Custom County Definition (1996).

<sup>77/</sup> Thus, for example, during the 1996 election campaigns, the Oakland County Executive, the outgoing Oakland County prosecutor, a candidate to succeed him, and the Macomb County prosecutor were all interviewed on WJR(AM), as were the Wayne County Executive and the Wayne County Sheriff. See also Hensell, "Newspaper war focuses media spotlight on Arlington," Dallas Business Journal, Nov. 29, 1996, 1996 WL 12494100 (noting regular coverage of Arlington stories by Dallas-Fort Worth radio stations).

<sup>78/</sup> Contrary to the dictum in Capital Cities/ABC, Inc., 11 FCC Rcd 5841, 5891 (1996), the 1975 Commission did not generally assign "limited weight to publications and broadcast media originating outside a community for purposes of analyzing diversity." Even in

facts) that metro-area media are not adequate "voices" for suburban communities, it would logically have to apply that thought to cross-ownerships between central-city radio stations and suburban dailies. On that premise, the cross-ownership between WJR(AM) and WHYT(FM), Detroit, and the Oakland Press in Pontiac could not be deemed to create any concentration of control over purely local Pontiac or Oakland County media. At most, it would reduce the number of independently owned *metropolitan* services available to that community and county. Joint ownership would therefore be justified if there would be enough remaining independently owned metro-area services available to them.<sup>79/</sup>

In contrast, as the Commission's experience under the radio/TV rule teaches,<sup>80/</sup> cross-ownership between media located *outside* of any metro area does call for a different approach.

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determining whether divestiture was needed to break up a "one newspaper/one station" monopoly, it took account of "outside" stations that placed a "principal community" contour over the newspaper community. See, e.g., 53 FCC 2d at 595 ("principal community" coverage by two New York City clear channel AM stations sufficed to exempt a newspaper and its cross-owned radio stations in Stamford, Connecticut from the divestiture requirement). More generally, the Commission presumed that stations which encompassed a newspaper community with a minimum (2 mVm, 1 mV/m or Grade A) contour were sufficiently local to invoke the cross-ownership ban in the first place. Where it is apparent that a cross-owned station providing a signal of this level does not serve the relevant community's needs in any substantial way, the rule has been waived. Media\Communications Partners, 10 FCC Rcd 8116 (1995).

<sup>79/</sup> Among the metro-area media that serve Pontiac and Oakland County are the Detroit News and the Free Press, which are operated jointly pursuant to a Joint Operating Agreement approved under the Newspaper Preservation Act. The objective of that Act is to preserve the editorial and reportorial independence of the jointly operated papers, and the statute requires the maintenance of that independence. See Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285, 1287, 1293 (D.C. Cir.), rehearing en banc denied, 868 F.2d 1300, aff'd by an equally divided court, 493 U.S. 38 (1989); Committee for an Independent P-I v. The Hearst Corp., 704 F.2d 467, 474, 481 (9th Cir.), cert. denied, 467 U.S. 892 (1983). Accordingly, the jointly operated Detroit papers must be regarded as two "voices" for diversity purposes.

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See Spectrum Radio, Inc., supra note 64.

In Hopkins Hall Broadcasting, Inc., 10 FCC Rcd 9764 (1995), a satellite-city daily published in Shelbyville, Tennessee -- outside the Nashville metro area -- sought to acquire one of three Shelbyville radio stations. In those circumstances, the Commission discounted the significance of service to Shelbyville and its immediate environs by Nashville radio, TV or other media, on the ground that such metropolitan media could not be expected to give major attention to the needs and issues peculiar to Shelbyville. That situation, however, is as exceptional in the newspaper/radio context as it has been in the administration of the radio/TV rule. It should not govern the Commission's overall approach.

**IV. Where the Presumptive Standard Is Not Met and the Commission Assesses Both the Diversity and the Competitive Effects of Cross-Ownership Case-by-Case, Its Competitive Analyses Should Employ Appropriate Product and Market Definitions**

We have urged that, where the presumptive standard we propose is not met, the Commission should consider waiver requests case-by-case, weighing the prospective benefits of cross-ownership against its likely harms. In that context, the Commission would need to engage in both diversity and competitive analyses and to define geographic and product markets for each purpose. The approach to market definition that we urge in point III would serve as well for purposes of diversity analysis under a case-by-case approach. We discuss in this point the market definitions that are appropriate for purposes of competitive analysis. As will become apparent, although there are similarities the two need not wholly coincide.

**A. Competitive Analysis: The Relevant Geographic Market**

The geographic scope of the advertising market in which local newspapers and radio stations compete depends upon the extent to which advertisers for the two media seek to reach a

common area,<sup>81/</sup> and is once again a function of the types of newspaper and radio station that may be proposed for cross-ownership. Where cross-ownership is proposed for a metropolitan daily newspaper and a central-city radio station, the Arbitron radio metro area would generally be appropriate. Where the cross-ownership would link a central-city station with a suburban daily, the same would be true. Although suburban newspapers cannot by themselves deliver the same audience to advertisers as a central-city broadcast station, they can form part of a package or group buy that does constitute such a substitute.<sup>82/</sup> There may be cases in which a narrower market would be appropriate, e.g., where cross-ownership is proposed for a satellite-city daily and a radio station in the same city.<sup>83/</sup> In few situations, however, will the area in which both media compete be so limited.

#### **B. Competitive Analysis: The Relevant Product Market**

While there are purposes for which newspaper advertising may properly be analyzed as a separate product market,<sup>84/</sup> any advertising product market that is broad enough to include *both*

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<sup>81/</sup> Radio stations and newspapers also compete for the attention of the public with each other and with many other media or activities. However, there is no commonly accepted standard of measurement for their shares in the resulting market or other commonly accepted mode of analyzing concentration in such a market.

<sup>82/</sup> See Economists Incorporated, "An Empirical Investigation of the Scope of Competition Among Newspapers, Radio, Television and Other Advertising Media," attached hereto as Appendix C, at 2-3. Cf., Community Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1160 (W.D. Ark. 1995), appeal pending (newspaper with circulation largely confined to one county of two-county metro area competed with paper that circulated in area as whole for budgets of regional advertisers on the basis of which paper gave "better value").

<sup>83/</sup> Cf., Spectrum Radio, Inc., supra note 64 and cases cited (comparable situations under the radio/TV rule analyzed in terms of narrower local market).

<sup>84/</sup> See, e.g., Community Publishers, Inc. v. Donrey Corp., supra note 82, 892 F. Supp. at 1155-56 (citing and discussing pertinent antitrust cases where newspapers were found to

daily newspapers and radio stations will necessarily include as well advertising vehicles -- broadcast and cable television, direct mail, Yellow Pages, outdoor and point-of-purchase -- that are at least as close to newspapers or to radio as those media are to each other. In Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), where the Commission waived the rule to allow a newspaper/TV cross-ownership, it relied upon a market including outdoor advertising (as well as newspapers, television stations, and radio stations) to evaluate the competitive consequences.<sup>85/</sup> Further, there is extensive evidence that advertisers in daily newspapers -- including both large, sophisticated national or regional advertisers and small, local retail advertisers -- utilize and weigh the relative benefits of a range of media and promotional devices, including direct mail, weekly papers, Yellow Pages, television stations, radio stations and outdoor advertising.<sup>86/</sup>

Finally, we submit with these comments a study by Economists Incorporated, which supplies evidence that an advertising market confined to newspapers and radio stations or to newspapers, radio stations and television stations, is too narrow.<sup>87/</sup> The study presumes that, if a product market is properly drawn, the prices at which the businesses competing in that market are sold will increase as the degree of concentration increases. It seeks to correlate the sales prices of broadcast stations in a variety of local areas with the degree of concentration that

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constitute a separate market).

<sup>85/</sup> See 8 FCC Rcd at 5346 ¶ 25 & 5352 ¶ 50.

<sup>86/</sup> See Owen, MM Docket No. 91-221, at 18-24 & Appendix D; Cameron, Nowak & Krugman, "The competitive position of newspapers in the local retail market," 14 Newspaper Research Journal 70 (1993); Malko, "Ops Finger Yellow Pages," Multichannel News, Feb. 4, 1991 at 15, 1991 WL 4857973 (cable operators successfully persuade advertisers to reduce expenditures on Yellow Pages and spend the savings on cable).

<sup>87/</sup> See Appendix C, attached hereto.

appears when the product market is confined to advertising carried by newspapers and radio stations or to advertising carried by newspapers, radio stations and television stations.

For each local area in which station sales prices are surveyed, the study employs three alternate definitions of the geographic market. No matter which such definition is employed, however, the study finds no statistically significant correlation between the sales prices of the relevant stations and the relative degree of concentration in a product market confined to newspapers and radio stations, or to newspapers, radio and television stations. These results, as the study concludes, suggest that no such effect exists. And if no such effect exists, the inference is that the product markets measured are defined too narrowly.

At a minimum this evidence imposes a substantial burden of justification on those who would confine the relevant market to newspapers and radio, or to newspapers, radio and television. In Midwest Radio Co., Inc. v. Forum Publishing Co., Inc., 942 F.2d 1294 (8th Cir. 1991), the Court of Appeals affirmed the grant of summary judgment rejecting a claim that the owner of a newspaper/TV/radio combination in Fargo, North Dakota, was monopolizing a "mass media advertising" market in that area. Although the plaintiff conceded that a wide variety of media competed in some degree for the trade of advertisers, it proposed a relevant product market limited to daily newspapers, radio and television (excluding weekly papers, direct mail, magazines and outdoor). The district court recognized the likelihood that television, daily newspapers and radio were "preferred methods of advertising." Midwest Radio Co., Inc. v. Forum Publishing Co., Inc., 1989 WL 108352, \*4 (D. N.D. 1989). But it found that, "[f]or the purpose of gaining access to consumers, the other media do have the potential to take away

significant amounts of business from television, radio and newspapers." Id.<sup>88/</sup> It granted summary judgment because the plaintiff had failed to supply sufficient evidence supporting the exclusion of those media from the relevant market, and the Court of Appeals squarely agreed. 942 F.2d at 1297.<sup>89/</sup>

The same conclusion is appropriate here. In the absence of the evidence that was missing in Midwest Radio -- and we know of none -- the appropriate product market must include the full range of media and promotional vehicles that compete for advertising business with newspapers and/or radio stations.<sup>90/</sup>

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<sup>88/</sup> Cf., Syndication and Financial Interest Rules, Memorandum Opinion and Order, 8 FCC Rcd 8270, 8286 ¶ 34 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994) ("Our appropriate regulatory focus . . . is not on whether producers would generally prefer to strike deals with one of the established networks, but rather whether the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs.").

<sup>89/</sup> See also Valet Apt. Services, Inc. v. Atlanta Journal and Constitution, 865 F. Supp. 828, 833 (N.D. Ga. 1994) ("Newspapers compete with other mass media for advertising business, such as suburban daily circulation newspapers, weekly newspapers, free-distribution specialty publications, paid circulation local magazines, direct mail services, cable television, television broadcast stations, and commercial radio."); Sales and Advertising Promotion, Inc. v. Donrey, Inc., 598 F. Supp. 538, 547 (N.D. Okla. 1984) (plaintiff alleged monopolization of a market confined to display advertising in daily and weekly papers; court found that product market also included local radio, outdoor and direct mail advertising).

<sup>90/</sup> Even if the Commission should disagree, moreover, it should take account of the substitutes for newspapers, radio and television in assessing the significance of HHI levels computed for the narrower product market. Where there are substitute products close to the margins of a product market, high HHI levels computed for the narrower market mean much less than they would if no such nearby substitutes existed. See Owen, MM Docket No.91-221, at 32-34.



**Conclusion**

For the foregoing reasons, we urge the Commission to relax its policies governing the waiver of its newspaper/broadcast cross-ownership rule in the case of newspaper/radio combinations. Following the model of the television/radio cross-ownership rules, the Commission should be predisposed to grant waivers for transactions that meet a "30 Voices" or "Top 50 Markets/30 Voices" standard. Where -- but only where -- this standard is not met, the Commission should weigh the effects of the transaction upon diversity and competition against any countervailing benefits to the public.

Respectfully submitted,


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February 7, 1997

## APPENDIX A

### CONCENTRATION IN A TYPICAL MULTIMEDIA ADVERTISING MARKET

The Commission's Notice suggests (at ¶ 20) that the 49% share of local advertising captured by daily newspapers nationwide in 1995 is representative of the situation in individual geographic markets. It asserts that, in most such markets, that share is captured by a single newspaper. We have argued in the text of these comments that shares of total local and national advertising combined more accurately reflect the choices available to local (as well as national) advertisers.<sup>1/</sup> We have argued also that the \$12 billion point-of-purchase advertising revenues estimated for 1995 -- which the 49% estimate ignores -- should be taken into account.

On that basis, the nationwide share of daily newspapers for 1995 was 25.3%. That figure, we have asserted, suggests that most advertising markets in which newspapers and radio stations compete are unconcentrated (with an HHI below 1000) and would remain unconcentrated -- or would, at most, become moderately concentrated (with an HHI between 1000 and 1800) -- in the presence of newspaper/radio cross-ownership.

The following tables display the HHI computations that underlie our assertion.<sup>2/</sup> Table A assumes that there is no cross-ownership among media or advertising vehicles. It also makes the

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<sup>1/</sup> We have excluded, for this purpose, the estimated advertising revenues of specialized media and media that provide only national exposure, including national magazines, farm publications, television and cable networks, television syndication (UPN, WB and barter ads), radio networks and business papers.

<sup>2/</sup> The sources for the information we present are the McCann-Ericson estimates for 1995 published in Advertising Age, May 22, 1996 at 22 and the 1995 point-of-purchase expenditures estimated by the Meyers Research Center and the Point of Purchase Advertising Institute that were published in The Reuter Business Report, March 18, 1996.

following assumptions concerning the shares captured by individual enterprises in particular categories:

1. Daily Newspapers: We assume that the entire daily newspaper share is captured by a single owner. This assumption is conservative, since -- even where a metropolitan market is served by a single central-city daily -- suburban dailies may collectively capture a significant portion of the available revenues.
2. Television Stations: We assume that four stations share equally in the television revenues. While there are distributions of shares among four stations that might produce a slightly higher contribution to the HHI, most markets contain considerably more than four competing commercial TV stations.
3. Cable Systems: We assume that all revenues are captured by a single owner (or a group whose sales are coordinated through a cable interconnect).
4. Radio Stations: We assume that a single owner has accumulated stations that collectively account for 50% of estimated radio revenues (slightly in excess of the maximum share that the Department of Justice and the Commission have thus far allowed). We assume also that four other owners, with shares of total revenues approximating 1% each, contribute four points to the HHI.
5. Yellow Pages: Although there is some degree of phone-directory competition in most markets, we assume that a single owner captures all of the revenues in this category.
6. Outdoor: Again, although there is competition in this field in most markets, we assume that a single owner captures all of the outdoor revenues.
7. Direct Mail: We have found no source of data on the market shares for individual enterprises in this field, which include a wide variety of entities. However, the U.S. Postal Service performs a major part of the distribution function involved, and barriers to entry into the field are quite low. See Advo. Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1193, 1200-02 (3d Cir. 1995). We assume that no individual company has a sufficient share of direct-mail revenues to contribute substantially to the HHI.
8. Miscellaneous: The McCann-Ericson estimates do not disclose the contents of this category. However, the Newspaper Association of America, which relies upon McCann-Ericson estimates for the advertising revenue captured by media other than daily newspapers, states that the "miscellaneous" category includes "weeklies, shoppers, pennysavers, bus and cinema advertising." We assume that no individual company has a sufficient share of these revenues to contribute substantially to the HHI.
9. Point of Purchase: We have found no source of data on market shares for individual enterprises in this field, which include a wide variety of retail outlets. We assume that no individual company has a sufficient share to contribute substantially to the HHI.

**Table A**  
**(No Media Cross-Ownership)**

<b>Medium</b>	<b>Revenues (Billions)</b>	<b>Share</b>	<b>HHI</b>
Newspapers	36.317	25.3 %	640.1
Television Stations	19.104	13.3 %	
Owner #1	4.776	3.3 %	10.9
Owner #2	4.776	3.3 %	10.9
Owner #3	4.776	3.3 %	10.9
Owner #4	4.776	3.3 %	10.9
Cable Systems	0.856	0.6 %	0.4
Radio Stations	10.858	7.6 %	
Owner #1	5.429	3.8 %	14.4
Owner #2	1.357	1.0 %	1.0
Owner #3	1.357	1.0 %	1.0
Owner #4	1.357	1.0 %	1.0
Owner #5	1.357	1.0 %	1.0
Yellow Pages	10.236	7.1 %	50.4
Outdoor	1.263	0.9 %	0.8
Direct Mail	32.866	22.9 %	--
Miscellaneous	20.232	14.1 %	--
Point-of Purchase	12.000	8.3 %	--
<b>Total</b>	<b>143.732</b>	<b>100 %</b>	<b>753.7</b>

Table B assumes that the single daily newspaper of Table A (with a 25.3% share) is cross-owned with the radio stations in the same market that have 50% of the radio revenues (and thus a 3.8% share).

**Table B**  
**(Newspaper/Radio Cross-Ownership)**

<b>Medium</b>	<b>Revenues (Billions)</b>	<b>Share</b>	<b>HHI</b>
Newspaper/Radio Combination	41.746	29.1 %	846.8
TV Stations	19.104	13.3 %	
Owner #1	4.776	3.3 %	10.9
Owner #2	4.776	3.3 %	10.9
Owner #3	4.776	3.3 %	10.9
Owner #4	4.776	3.3 %	10.9
Cable Systems	0.856	0.6 %	0.4
Remaining Radio Stations	5.429	3.8 %	--
Owner #1	1.357	1.0 %	1.0
Owner #2	1.357	1.0 %	1.0
Owner #3	1.357	1.0 %	1.0
Owner #4	1.357	1.0 %	1.0
Yellow Pages	10.236	7.1 %	50.4
Outdoor	1.263	0.9 %	0.8
Direct Mail	32.866	22.9 %	--
Miscellaneous	20.232	14.1 %	--
Point-of Purchase	12.000	8.3 %	--
<b>Total</b>	<b>143.732</b>	<b>100 %</b>	<b>946.0</b>

Table C assumes that the single daily newspaper of Table A (with a 25.3% share) is cross-owned with the radio stations in the same market that have 50% of the radio revenues (and thus a 3.8% share) *and* with one television station (with a 3.3% share).

**Table C**  
**(Newspaper/Television/Radio Cross-Ownership)**

<b>Medium</b>	<b>Revenues (Billions)</b>	<b>Share</b>	<b>HHI</b>
Newspaper/TV/Radio Combination	46.522	32.4 %	1049.8
Remaining TV Stations	14.328	10.0 %	
Owner #1	4.776	3.3 %	10.9
Owner #2	4.776	3.3 %	10.9
Owner #3	4.776	3.3 %	10.9
Cable Systems	0.856	0.6 %	0.4
Remaining Radio Stations	5.429	3.8 %	--
Owner #1	1.357	1.0 %	1.0
Owner #2	1.357	1.0 %	1.0
Owner #3	1.357	1.0 %	1.0
Owner #4	1.357	1.0 %	1.0
Yellow Pages	10.236	7.1 %	50.4
Outdoor	1.263	0.9 %	0.8
Direct Mail	32.866	22.9 %	--
Miscellaneous	20.232	14.1 %	--
Point-of Purchase	12.000	8.3 %	--
<b>Total</b>	<b>143.732</b>	<b>100 %</b>	<b>1138.1</b>

## **APPENDIX B**

The attached materials display the Arbitron radio metro areas for Detroit and Dallas-Fort Worth, as well as the principal areas of circulation for the Detroit News and Detroit Free Press, the Oakland Press, the Fort Worth Star-Telegram and the Dallas Morning News.



PRINTED AND RELEASED  
BY ABC SEPTEMBER, 1996

# **AUDIT REPORT:** **THE DETROIT NEWS (Evening)** **DETROIT FREE PRESS (Morning)** **THE DETROIT NEWS AND DETROIT FREE PRESS (Saturday & Holidays & Sunday)** **Detroit (Wayne County), Michigan**

## **TOTAL AVERAGE PAID CIRCULATION FOR 3 MONTHS ENDED MARCH 31, 1996: (See Par. 9(a))**

<b>1A. TOTAL AVERAGE PAID CIRCULATION (BY INDIVIDUALS AND FOR DESIGNATED RECIPIENTS):</b>	<b>Combined Daily</b>	<b>Morning (Mon. to Fri.)</b>	<b>Evening (Mon. to Fri.)</b>	<b>Saturday &amp; Holidays</b>	<b>Sunday</b>
Home Delivery .....	362,047	224,999	137,048	404,736	498,471
Single Copy Sales .....	206,068	120,156	85,912	150,385	269,084
Mail Subscriptions .....	558	379	179	504	1,122
Newspapers in Education .....	5,641	4,707	934	214	143
Employee Copies .....	2,384	1,197	1,187	1,203	774
<b>TOTAL AVERAGE PAID CIRCULATION (BY INDIVIDUALS AND FOR DESIGNATED RECIPIENTS) .....</b>	<b>576,698</b>	<b>351,438</b>	<b>225,260</b>	<b>557,042</b>	<b>769,594</b>

## **1B. TOTAL AVERAGE PAID CIRCULATION (BY INDIVIDUALS AND FOR DESIGNATED RECIPIENTS) BY ZONES:** (See Par. 1E for description of area)

<b>CITY ZONE</b>	<b>Population</b>	<b>Occupied Households</b>			
1990 Census:	1,252,310	462,271			
#1-1-95 Estimate:	1,205,700	445,100			
Home Delivery, See Par. 9(c) .....			69,421	38,180	31,241
Single Copy Sales .....			49,711	26,523	23,188
Mail Subscriptions .....					
Newspapers in Education .....			921	871	50
Employee Copies .....			476	217	259
<b>TOTAL CITY ZONE .....</b>			<b>120,529</b>	<b>65,791</b>	<b>54,738</b>
<b>RETAIL TRADING ZONE</b>					
	<b>Population</b>	<b>Occupied Households</b>			
1990 Census:	3,425,532	1,271,606			
#1-1-95 Estimate:	3,532,200	1,316,600			
Home Delivery, See Par. 9(c) .....			254,541	155,823	98,718
Single Copy Sales .....			102,690	59,669	43,021
Mail Subscriptions .....					
Newspapers in Education .....			2,336	1,803	533
Employee Copies .....			1,733	848	885
<b>TOTAL RETAIL TRADING ZONE .....</b>			<b>361,300</b>	<b>218,143</b>	<b>143,157</b>
	<b>Population</b>	<b>Occupied Households</b>			
1990 Census:	4,677,842	1,733,877			
#1-1-95 Estimate:	4,737,900	1,761,700			
<b>TOTAL CITY &amp; RETAIL TRADING ZONES .....</b>			<b>481,829</b>	<b>283,934</b>	<b>197,895</b>
<b>ALL OTHER</b>					
Home Delivery .....			38,085	30,996	7,089
Single Copy Sales .....			53,667	33,964	19,703
Mail Subscriptions .....			558	379	179
Newspapers in Education .....			2,384	2,033	351
Employee Copies .....			175	132	43
<b>TOTAL ALL OTHER .....</b>			<b>94,869</b>	<b>67,504</b>	<b>27,365</b>
<b>TOTAL AVERAGE PAID CIRCULATION (BY INDIVIDUALS AND FOR DESIGNATED RECIPIENTS) .....</b>			<b>576,698</b>	<b>351,438</b>	<b>225,260</b>
Days Omitted from Averages .....			None of record	None of record	None of record

## **1C. THIRD PARTY (BULK) SALES:**

Airlines — Available for passengers .....	192	123	69	60	60
Hospitals and Nursing Homes — Available for patients .....	150	108	42	62	40
Hotels, Motels — Available for guests .....	610	505	105	795	909
Restaurants — Available for patrons .....	512	481	31	424	413
<b>TOTAL AVERAGE THIRD PARTY (BULK) SALES .....</b>	<b>1,464</b>	<b>1,217</b>	<b>247</b>	<b>1,341</b>	<b>1,422</b>

#Market Statistics, Producers of "The Survey of Buying Power," See Par. 9(b).



[illegible]

A black and white outline map of the state of Michigan. The city of Detroit is marked with a black dot in the southeastern part of the state, with the word "Detroit" written in bold text next to it.

This inset map shows the Detroit area and its surroundings. The map includes the following locations and ZIP codes:

- United States:**
  - Troy: 48007, 48083-84, 98-99
  - Clawson: 48017
  - Birmingham: 48009-12
  - Franklin: 48025
  - Bingham Farms: 48025
  - Farmington: 48331-36
  - Lathrup: 48076
  - Village Park: 48076
  - Oak Park: 48076
  - Madison: 48072
  - Berkley: 48072
  - Center Line: 48015
  - Roseville: 48068
  - St. Clair Shores: 48080-82
  - Highland Park East: 48021
  - Highland Park West: 48021
  - Detroit: 48201-17, 19, 21-24, 26-28, 31-35, 38, 42-44
  - Ramtranci: 48212
  - Grosse Pointe Woods: 48236
  - Grosse Pointe Farms: 48236
  - Grosse Pointe Park: 48230
  - Belle Isle
  - Zug Island
  - River Rouge: 48216
  - Ecorse: 48229
  - Lincoln Park: 48146
  - Wyandotte: 48192
  - Gilbratrar: 48173
  - Rockwood: 48173
  - Trenton: 48183
  - Grosse Isle: 48138
  - Woodhaven: 48183
  - Riverview: 48192
  - Taylor: 48180
  - Southfield: 48195
  - Allen Park: 48101
  - Romulus: 48174
  - Inkster: 48141
  - Westland: 48186
  - Garden City: 48135-36
  - Wayne: 48184
- Wayne Co.**
- Michigan:**
  - Dearborn
- Canada:**
  - Ontario:**
    - Essex Co.**
- Other Locations:**
  - Mount Clemens: 48043-46
  - Sterling Heights: 48310-14
  - Warren: 48089-93
  - Fraser: 48026
  - Lake St. Clair